

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier	)	CC Docket No. 01-92
Compensation Regime	)	

REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.  
ON FURTHER NOTICE OF PROPOSED RULEMAKING

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**REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.  
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Qwest Communications International Inc. ("Qwest") hereby submits its reply comments in the above captioned docket.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

In this docket, the Federal Communications Commission ("Commission") seeks to bring about reform that is absolutely vital to the future of the American telecommunications industry. The current environment whereby carriers compensate each other for traffic which they exchange is now hopelessly contradictory and conflicting, allowing for massive arbitrage opportunities and the potential for fraud. There seems to be no serious dispute on this basic point -- that reform of the intercarrier compensation structure is necessary if the American telecommunications infrastructure and marketplace are to continue to grow and flourish. The magnitude of the intercarrier compensation difficulty was aptly described by Jonathan Nuechterlein and Philip Weiser in their book *Digital Crossroads*, in which they described the current system as:

. . . what happens when regulators settle instead for an incoherent patchwork of mutually inconsistent intercarrier compensation schemes, each of which applies

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<sup>1</sup> *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 (rel. Mar. 3, 2005) ("*Further Notice*"); a summary of the *Further Notice* was published in the Federal Register on Mar. 24, 2005 (70 Fed. Reg. 15030).

only to an arbitrarily compartmentalized class of calls or carriers. The result is arbitrage and competitive distortion, . . .<sup>2</sup>

Indeed, in this highly contentious docket there appear to be two points of near-universal agreement -- the need for immediate reform and the need for a uniform solution to the intercarrier compensation issue.<sup>3</sup> While there are many difficult decisions that the Commission must make in developing a set of rules in this docket, the consensus on the need for immediate and uniform reform should provide the foundation for a rational and stable solution.

Qwest's solution to the intercarrier compensation puzzle is simple and appears to answer many of the questions raised concerning other bill and keep intercarrier compensation proposals. Denominated "bill and keep at the edge," the Qwest proposal puts the onus on each carrier to bring its originating traffic to the "edge" of the receiving carrier's network. Key to the plan is recognition of the fact that this mutual responsibility will provide economic, rather than regulatory, incentives to carriers to determine the most desirable and efficient means of exchanging traffic by way of contract, rather than rule. The plan encompasses intrastate as well as interstate access in addition to local interconnection, and the Commission's uniform plan must therefore contain elements that cut across interstate and intrastate jurisdictional lines. These jurisdictional issues would be resolved with the advice of a federal-state joint board convened

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<sup>2</sup> Jonathan E. Nuechterlein and Philip J. Weiser, *Digital Crossroads*, The MIT Press, 2005, p. 293.

<sup>3</sup> Throughout this reply, Qwest advocates the seemingly contradictory positions that the Commission should act to resolve the intercarrier compensation quagmire immediately and that it should convene a federal-state joint board to assist it in resolving the federal/state jurisdictional issues which intercarrier compensation presents. Qwest recognizes that the federal-state joint board process takes time, and we do not downplay the fact that such an approach could be seen as delaying, not expediting, resolution of intercarrier compensation. It is Qwest's belief that, because a federal-state joint board can contribute greatly to ensuring that the ultimate resolution of the pending intercarrier compensation issues is both effective and lawful, the expeditious use of a federal-state joint board can actually reduce overall delay in the long run.

under Section 410 of the Act.<sup>4</sup> Current intercarrier compensation revenues, including intrastate and interstate access revenues (netted to include revenues and expenses for transport and termination), foregone because of the move to a bill and keep structure, would be recovered through an increased subscriber line charge assigned to the interstate jurisdiction through the federal-state joint board process. Special problems of high cost carriers are dealt with through a benchmark rate and a uniform termination charge on all interexchange traffic.

This plan, and the reasons why it is both optimal from a public policy perspective and lawful, are discussed in these reply comments.

A. The Commission Must Address The Intercarrier Compensation Issue In A Manner That Is Both Realistic And Timely.

In order for the Commission to come to an optimal intercarrier compensation structure in this docket, Qwest suggests that the Commission focus on four separate but interrelated principles. If these principles are adhered to, and are included in the goals established for this docket,<sup>5</sup> the Commission's ultimate resolution of intercarrier compensation can go far in bringing some of the critical pro-competitive goals of the 1996 Act to fulfillment, or at least closer to fulfillment.

- First, the Commission must unify intercarrier compensation. This includes both harmonizing carrier exchange access with local intercarrier reciprocal compensation and including state access rules in the overall uniform interconnection structure.

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<sup>4</sup> Qwest emphasizes that it does not recommend a massive joint board inquiry that would defeat the goal of expeditious resolution of the intercarrier compensation issues. The joint board would be tasked only with assisting in resolving several key jurisdictional issues in those areas where Section 410 envisions joint board involvement, and would be tasked with providing such assistance on an expedited basis.

<sup>5</sup> See *Further Notice*, 20 FCC Rcd at 4701-02 ¶ 31 “promote economic efficiency,” 4702 ¶ 32 “[p]reservation of universal service,” ¶ 33 “competitively and technologically neutral.”

There is agreement on this principle, although there is disagreement on whether the Commission has the necessary statutory authority to adopt a meaningful unified scheme.<sup>6</sup> Qwest submits that the assistance of a federal-state joint board on jurisdictional issues is the optimal method of implementing a unified intercarrier compensation structure in a manner that is both timely and stable.

- Second, the Commission must also devise a set of intercarrier interconnection rules that are balanced and do not permit some carriers to create inefficiencies by forcing another carrier to pay for them. Any intercarrier compensation rules cannot enable one carrier to direct or control the network configuration of another carrier, especially at the expense of that other carrier.
- Third, the Commission must eliminate inefficiencies inherent in the CPNP structure, which is not a viable economic model in today's telecommunications market. While the Act speaks in terms of transport and termination of traffic originated on the network of one carrier and terminated on the network of another, the economic and physical concepts of origination and termination no longer hold the same meaning today that they did a decade ago when the Act was under consideration. An excellent example of this shift involves Information Service Provider ("ISP") traffic, where the physical "originator" of a particular call is generally considered to be the party calling the ISP, while the economic "originator" is the ISP itself. That is, because the ISP invites calls to itself as part of its information service, the ISP (and, concomitantly the carrier serving the ISP) is the "cost causer" of an ISP call. The Commission has already found that the ISP

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<sup>6</sup> As is discussed below, various commenters claim that the Commission does not have jurisdiction over intercarrier compensation rates (which they claim are delegated to state regulators) or that, if it does have such jurisdiction, it is statutorily barred from adopting anything other than a calling party's network pays ("CPNP") structure.

“reciprocal compensation” rules are anticompetitive and contrary to the purposes of the Act. Whenever regulations create payment obligations that are contrary to the manner in which the market actually functions, the potential for arbitrage is always present, and in the reciprocal compensation context the reality of arbitrage is enormous. Qwest’s bill and keep at the edge plan minimizes arbitrage opportunities and incentives in a fair and reasonable manner.

- Fourth, the Commission must deal with the foregone intercarrier compensation revenues occasioned by the shift to a uniform access structure. Whenever a significant regulatory shift causes a loss of revenues that have been reasonably relied on and earned as part of a previous regulatory structure, the Commission must take action to provide carriers with a reasonable opportunity to earn the foregone revenues under the new regime. Qwest’s approach to this issue is to permit a unified interstate subscriber line charge (“SLC”) increase to recover intercarrier compensation revenues (*i.e.*, switched access and reciprocal compensation)<sup>7</sup> earned under the current compensation rules which would be eliminated under the new structure. If the resulting weighted local rate (as defined herein), including the revised SLC, falls at or above a national benchmark, the carrier can request permission to implement a termination charge on interexchange traffic to recover the balance over the benchmark.

B. The Commission Has The Authority To Effectuate A Viable Intercarrier Compensation Regime Based On Qwest’s Proposed Solution.

Another issue that seemingly broods over this entire docket is whether the Commission has the authority to accomplish the necessary reform. Despite the critical nature of the necessary reform, and the impact of intercarrier compensation on the national telecommunications

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<sup>7</sup> Special access is excluded from Qwest’s plan.

infrastructure, various commenters claim that the Commission is powerless to actually implement the necessary reform. This is a multilayered question, but it can basically be divided into two sub-elements:

- Whether the Commission has the jurisdiction to devise and enforce a unitary intercarrier compensation structure in the face of the claim that there is an intrastate component to intercarrier compensation that is reserved to state regulators.
- Whether the Commission has the authority to implement an intercarrier compensation scheme that deviates from the CPNP structure in the face of claims that the Act itself requires that any scheme adopted by the Commission be based on CPNP.

With regard to the first issue, it is generally agreed that a unified structure is absolutely critical. But a number of commenters (primarily representative of state regulators) claim that the Commission lacks authority to implement a unified structure because of residual state jurisdiction under Sections 152(b) and 252 of the Act. They claim that the Commission's authority is limited to "interstate" intercarrier compensation, and that states have sole authority over "intrastate" intercarrier compensation. This argument often relies on the Eighth Circuit's decision in *Iowa Utilities Board II* that the Commission's default prices set in the *Local Competition Order* were beyond the Commission's jurisdiction, which was limited to setting ratemaking methodology, not rates themselves.<sup>8</sup> The argument is that a bill and keep regime entails prescription of a rate, not a rate methodology, and that the Commission is without authority to set such a rate.

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<sup>8</sup> See *Iowa Util. Bd. v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997) ("*Iowa Utilities Board II*"), vacating on jurisdictional grounds the Commission's *Local Competition Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").

Qwest submits that the Commission has full authority to deal with intercarrier compensation reform on a unified basis, and that the *Iowa Utilities Board II* decision is readily distinguishable (and, in any event, involved only a determination by the Eighth Circuit as to what was the “best” interpretation of the Act, which is subject to revisitation by the Commission under appropriate circumstances).<sup>9</sup> As pointed out in Qwest’s initial comments, intercarrier compensation matters are entrusted to the Commission’s authority under Section 252(b) of the Act, and the Commission, either through a direct exercise of its jurisdiction or through preemptive action, can implement a national bill and keep regime that applies to all aspects of interconnection. To the extent that *Iowa Utilities Board II* can be read as interpreting Section 252(d) to the contrary, such a decision is clearly a statutory determination of the “best” reading of ambiguous statutory language, and as such it is subject to further evaluation by the Commission under the principles set forth in the Supreme Court’s recent *Brand X* decision. Given the new market and regulatory context in which this proceeding is taking place, the Eighth Circuit’s decision in *Iowa Utilities Board II*, is subject to revisitation pursuant to *Brand X*. Of course, the Eighth Circuit’s decision must be treated with respect, but it is not carved in stone.

However, as is noted in Qwest’s initial comments, the Commission’s jurisdiction to achieve one critical component of intercarrier compensation reform -- ensuring that regulated carriers are not deprived of a reasonable opportunity to earn the intercarrier revenues lost through implementation of a bill and keep regulatory regime<sup>10</sup> -- would seem to cause particularly thorny

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<sup>9</sup> See *National Cable & Telecommunications Association, et al. v. Brand X Internet Services, et al.*, Case No. 04-277, Slip Opinion (S. Ct. June 27, 2005) (“*Brand X*”).

<sup>10</sup> As the Commission has the overall responsibility and authority to bring into being a unified national intercarrier compensation system, it also has the responsibility to ensure that the structure is compensatory (*i.e.*, that local exchange carriers (“LECs”) are not prevented by regulation from recovering access charges that are lost because of the adoption of a bill and keep regime (or any other unified compensation regime)).

jurisdictional issues because of the statutory prohibition against the Commission setting rates for intrastate services. In order for the Commission to adopt a comprehensive and lawful intercarrier compensation scheme, therefore, it appears that it is necessary that the Commission convene a federal-state joint board to undertake the separations changes necessary to assign the investment, costs and revenues currently associated with intrastate access to the federal jurisdiction. This necessary inquiry would include examination of those aspects of the intercarrier compensation issue that implicate state jurisdiction (but which require a unified solution). Obviously, especially given the necessity of expedition, the joint board would be given a limited mandate and a tight time schedule for its recommendations to the Commission. As is discussed herein, the federal-state joint board process, while superficially cumbersome, actually presents the best option for resolving the critical jurisdictional issues that must be resolved before intercarrier compensation reform can become a reality.

With regard to the second issue, many opponents of a bill and keep approach to intercarrier compensation claim that the Commission is bound by the Communications Act to adopt and maintain an intercarrier compensation regime based on CPNP principles. This argument is predicated on the language of Section 252(d)(2)(A)(i) to the effect that a carrier is entitled to recover the “costs associated with the transport and termination on each carrier’s network facilities of calls that originate on the network facilities of the other carrier.” Obviously, if Sections 251(b)(5) and 252(d)(2) of the Act require, as a matter of law, payment by an originating carrier to a terminating carrier, any system that is based on a bill and keep mechanism would be illegal. But this interpretation of the Act is erroneous. The Act imposes no requirement that the Commission adopt a CPNP structure for intercarrier compensation. In fact, finding such a precise statutory mandate for a particular compensation mechanism would make

no sense because it would have entailed the type of detailed policy choices by Congress that the Act leaves to the Commission in all other instances. Congress in no way evidenced that it was enacting a statutory scheme that so dramatically tied the hands of the Commission in dealing with such a complex issue, and the plain terms of the statute support the Commission's discretion to adopt any reasonably compensatory regime that is the product of reasoned decision-making.. The statutory mandate is to ensure the opportunity for cost recovery, not to pre-select a particular methodology for such recovery as a statutory straight jacket. The notion that the Act prohibits the Commission from adopting a rule that requires carriers to bill their own customer for service is simply farfetched. Bill and keep is clearly within the Commission's *Chevron II* discretion in interpreting the Act.<sup>11</sup> The Commission is fully within its authority when it revisits an earlier interpretation of an ambiguous statute based on new factors, facts and considerations, even if the prior interpretation was made by a court.

C. It Is Important That The Commission Not Further Strain The Universal Service Infrastructure By Increasing The Total Amount Of Universal Service Funding Administered Through The Various Universal Service Funds.

The universal service surcharge on interstate retail telecommunications services is currently set at 10.2%. This is to the best of our knowledge the largest tax ever assessed by an unelected body in the United States. A key feature of the Qwest plan is that the universal service funding does not increase overall, with the minor exception of support for low income customers by increasing the Lifeline program. This is critical. Many commenters claim that there is something uneconomical or inherently unfair about having carriers recover their costs from their own customers (as opposed to cost recovery from another carrier). To the contrary, a cost recovery mechanism based on customer choice, rather than regulatory fiat, is the only structure

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<sup>11</sup> The Supreme Court's recent *Brand X* decision provides significant guidance on the Commission's responsibilities when interpreting an ambiguous statute.

that makes economic sense in the long run. The universal service fund is ultimately intended to enable customers who cannot afford to pay cost-based telephone rates to be subsidized. This is a vital policy and Qwest supports it. But universal service funding cannot be relied on to cure all economic problems of carriers, especially those who do not prefer to attempt to recover their costs from their customers. Nor is it intended to be a panacea beyond its intended effect of ensuring universal telephone service. It is, accordingly, important that the universal service funds not become a vehicle (and especially that they not be increased) in this docket to offset some of the effects of market-based competition that may not be viewed as optimal by some carriers.

D.     Some Critical Issues Cannot Await Complete  
          Industry-Wide Intercarrier Compensation Reform.

As discussed in Qwest's opening comments, there are several intercarrier compensation issues that cannot await implementation of comprehensive intercarrier compensation reform for their resolution. There is almost universal support from commenting parties addressing these issues, even where there is disagreement on the ultimate solution, that these issues should be addressed immediately. These four issues are the source of immediate economic dislocations and demand expeditious resolution outside the overall context of intercarrier compensation reform. Fortunately, their resolution does not depend on the Commission figuring out the myriad of interrelated issues that must be part of any rational approach to a uniform intercarrier compensation regulatory structure.

- Transiting -- The Commission should recognize that transiting services should be provided via intercarrier contracts subject to Sections 201(a), 202(a) and 211(a) of the Act. Contrary to the contentions of a number of commenters, providers of transiting

service are not providing a local exchange service. Nor are they originating carriers under the existing intercarrier compensation rules.

- VNXX -- The Commission should clarify that carriers cannot manipulate the numbering process and their right to establish a single point of presence (“POP”) within a LATA to artificially undercut the toll services of other carriers. There is strong support in the initial comments for Qwest’s position that calls are interexchange or local depending on their end-points, regardless of the numbers assigned by carriers to their customers.
- Commercial Mobile Radio Service (“CMRS”) -- The anomalies caused by treating CMRS calls within a Major Trading Area (“MTA”) as local regardless of their end-points must be corrected immediately. There is also strong support in the initial comments for Qwest’s position that the intra-MTA rule should be eliminated.
- ISP reciprocal compensation -- Especially after the Commission’s *Core Communications* decision,<sup>12</sup> the ISP “reciprocal compensation” problem remains at a crisis level. As the Commission has already concluded, ISP “reciprocal compensation” undercuts the fundamental purposes and intentions of the Act, and must be corrected. Qwest agrees with the numerous other commenting parties who, irrespective of their ultimate position on other intercarrier compensation issues, support the immediate transition of ISP traffic exchanged between local carriers to a bill and keep structure.

These issues demand an immediate resolution. While the ultimate solution to all of the intercarrier compensation issues raised in this docket is obviously a matter of regulatory judgment within the context of the Communications Act, resolution of these issues is

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<sup>12</sup> See *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order*, Order, 19 FCC Rcd 20179 (2004), *appeals pending sub nom. Core v. FCC*, Nos. 04-1368 (filed Oct. 27, 2004) and 04-1423 (filed Dec. 17, 2004) (D.C. Cir.).

straightforward and compelling. This resolution must be undertaken with a view towards timely action -- without waiting for total resolution of the intercarrier compensation docket.

## II. QWEST'S EDGE PLAN IS THE OPTIMAL APPROACH TO INTERCONNECTION

Qwest, like a number of other parties, advocates interconnection at the “edge” of the network. While supporters of interconnection at the edge often support bill and keep, the two are not necessarily linked. For example, the Public Service Commission of Missouri (“MO PSC”) and the National Association of Regulatory Utility Commissioners (“NARUC”) support the Intercarrier Compensation Forum’s (“ICF”) interconnection at the edge plan, but neither supports bill and keep.<sup>13</sup> Among the commenters who have endorsed edge proposals are ICF, NARUC, Western Wireless and T-Mobile.

Unlike some of the other edge proposals before the Commission, Qwest’s simple, straightforward proposal is non-discriminatory and technology-neutral. It would apply to any hand-off of telecommunications between telecommunications carriers on the public switched network.

Qwest proposes the following interconnection plan:

1. Each carrier must establish an “edge” of its own network in each LATA in which it intends to receive traffic.<sup>14</sup> At a minimum, the “edge” must be placed so that all switching-type functions provided by the carrier are included within that carrier’s network. For a hierarchical circuit switched network, the “edge” will be at the access tandem location serving the subscriber’s local switch. For a non-hierarchical circuit switched network, the “edge” will be at the local switch location serving the subscriber. If no switch is located in the LATA to be served, an “edge” must be established in the LATA to be served. The cost

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<sup>13</sup> As is discussed below, Qwest’s bill and keep at the edge plan encompasses two related but distinct components: 1) interconnection at the edge; and 2) bill and keep compensation. The necessity of the Commission establishing a standard and uniform (all-encompassing) process for interconnection is independent of adoption of the preferred compensation structure. While both should be adopted together, it is not necessary that the Commission tie the adoption of the two segments of the plan too tightly together.

<sup>14</sup> Carriers can have multiple edge locations within the LATA.

of facilities between the distant switch and the “edge” are the responsibility of the carrier that has chosen not to put a switch in the LATA. For an interexchange carrier (“IXC”), the edge will be its POP(s) in each LATA.

2. The originating carrier is responsible for paying the cost of facilities transporting traffic to another carrier’s “edge”. Such cost may be recovered from the originating carrier’s subscribers at the option of the carrier.
3. In the case where an originating carrier utilizes a transiting carrier for transport to another carrier’s “edge,” the transiting carrier may charge the carrier originating the traffic to the transiting carrier based on reasonably negotiated contracts. Transitng should be offered, whether by an incumbent LEC or another party, via intercarrier contracts negotiated between carriers and subject to Sections 201(a), 202(a) and 211(a) of the Act but not presumptively regulated by the Commission. The originating carrier may recover such costs from its own subscribers.<sup>15</sup>
4. Qwest proposes a three-year, four-step transition. During the first two years carriers will continue to physically interconnect their networks under the CPNP regime. The third year there will be a “network flip.” The network flip occurs when interconnection moves from the current rules to the edge rules.

These rules would apply in the absence of a negotiated agreement to the contrary. In the case of a dispute regarding the location of the edge, the carriers would have the opportunity to seek arbitration of the dispute.

A. Other Edge Plans In The Record Are Either Discriminatory, Not Competitively Neutral, Or Inefficient.

1. “ICF’s Edge Plan Is Discriminatory And Is Not Competitively Neutral.

ICF’s edge plan, which, as stated above, has drawn the approval of the MO PSC and NARUC, makes unfairly discriminatory distinctions between various types of carriers. For example, ICF’s plan discriminates against non-hierarchical carriers when they interconnect with hierarchical carriers. Between like networks, the originating network bears the responsibility of getting the call to the terminating network. Between a hierarchical network and a non-

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<sup>15</sup> The rules are set out in an Ex Parte (and attachments) from John W. Kure, Qwest to Marlene H. Dortch, FCC, filed herein on Aug. 2, 2002.

hierarchical network, the non-hierarchical carrier, when it originates or terminates traffic, must get the call to or from the hierarchical carrier's edge. As Pac-West and other competitive LECs point out this distinction between hierarchical and non-hierarchical carriers exists only to identify carriers on whom additional transport obligations are imposed when they interconnect with incumbent LECs.<sup>16</sup> In contrast to the ICF, and as made clear by Pac-West and other competitive LECs, Qwest makes a distinction between hierarchical carriers and non-hierarchical carriers only to determine what would qualify as an edge for different types of carriers.<sup>17</sup> Qwest does not make distinctions among various types of carriers in the transport obligation to bring traffic to other carriers' edges.<sup>18</sup>

The ICF plan also discriminates against carriers that do not meet its definition of Covered Rural Telephone Company ("CRTC"). The ICF's creation of special interconnection rules for CRTC's is not competitively and technologically neutral. The ICF provides that an interconnecting carrier must deliver traffic terminating to the CRTC's end users to the CRTC at the CRTC's designated edge within the contiguous portion of the CRTC's study area where the traffic will terminate. The CRTC's are not, however, required to deliver traffic to an interconnecting carrier at a point outside of the contiguous portion of the CRTC's study area where the traffic originates, except to reach another CRTC within the same LATA. Thus, the originating carrier has to deliver traffic into the CRTC's study area, but the CRTC does not have to deliver traffic outside of its own study area. There is also a forced transport rate that applies to the transport of traffic going to the CRTC's edge if the CRTC's facilities are used. Both of these modifications to the general "edge" concept unfairly tilt the interconnection negotiations in favor

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<sup>16</sup> Pac-West at 35.

<sup>17</sup> *Id.* at 39-40.

<sup>18</sup> *Id.*

of the CRTC. There are many hundreds of small carriers (and not-so-small carriers), likely to be designated CRTC, in Qwest's 14-state region. At the same time, Qwest serves many sparsely populated areas, similar to those served by small rural carriers. ICF's CRTC carve-out proposal discriminates between carriers who may be carrying the same type of traffic originating in similar high cost areas. Because of Qwest's unique geographic position, the burden of subsidizing CRTC would fall disproportionately on Qwest, something which is not consistent with the Act.

ICF and Qwest also differ in their treatment of transport. If the originating carrier does not desire to carry traffic to the terminating carrier's edge, the ICF plan provides a formula for determining the rate at which the terminating carrier offers transport. Qwest prefers, instead, to rely upon the open market to determine the terms of any transport transaction. Because the Qwest plan puts the burden on each carrier to get to the edge of the other carrier's network, the issue addressed here by the ICF should not arise.

2. The Independent Wireless Carriers' Plan Is Not Competitively Neutral And Is Administratively Infeasible.

The Independent Wireless Carriers' plan, initially submitted by Western Wireless, also fails the competitive neutrality test because it proposes a longer transition time for smaller carriers.<sup>19</sup> The plan proposes a six-year transition for carriers with fewer than 30,000 lines in a state and fewer than 100,000 lines nationwide and a four-year plan for all other carriers. This staged transition would be difficult to implement, since carriers directly interconnecting with small carriers would have to operate under multiple regimes, depending upon the size of the carrier with which it is interconnecting. A carrier trying to operate under multiple plans would

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<sup>19</sup> Independent Wireless Carriers (Western Wireless Corporation and Suncom Wireless, Inc.) at 30.

not be able to establish stable rates because its obligations to pay (and its ability to receive) compensation would be based on the identity of the interconnecting carrier. Qwest's transition plan avoids this problem by proposing that all carriers transition at the same time.

The Independent Wireless Carriers also discriminate against incumbent LECs by urging the Commission to require incumbent LECs, and only incumbent LECs, to provide transit service at regulated rates.<sup>20</sup> There is no evidence to suggest this requirement. Again, reliance upon the open market to govern the prices of all transit providers is the optimal approach to transiting, but a system that singled out incumbent LECs for regulated transiting obligations is not justifiable under any circumstance.

3. T-Mobile's Plan Would Lead To Network Inefficiencies.

T-Mobile is closest to Qwest's plan, but it too has problems. T-Mobile allows the non-terminating carrier to choose any terminating carrier edge for the delivery of traffic for a given LATA.<sup>21</sup> Qwest's plan requires that the tandem serving the subscriber's end office switch would serve as the edge for the competitive LEC serving that subscriber which maximizes the carrier's ability to control its own network. Adopting T-Mobile's proposal would cause network inefficiency for the terminating carrier by requiring the terminating carrier to haul traffic to end offices not behind the tandem serving the called subscriber's switch. This would increase the switching and transport requirements of the terminating carrier. The proper edge for interconnection purposes should be the tandem serving the local called party's switch.

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<sup>20</sup> *Id.* at 34.

<sup>21</sup> T-Mobile at 19.

B. Qwest's Edge Plan Avoids The Problems Noted By Those Who Oppose Interconnection At The Edge.

Objections to interconnection at the edge<sup>22</sup> are based upon fears that it would be 1) too complex and would lead to substantial costs in reconfiguring existing interconnection arrangements, 2) too costly for rural companies because of increased transport burdens, and 3) susceptible to arbitrage. Qwest's interconnection at the edge plan avoids these problems, where other plans may have created problems. Under Qwest's plan each carrier has the responsibility to get its traffic to the edge of the network of the other carrier, both carriers are given the maximum market incentives to negotiate reasonably to achieve a solution that is to both carriers' satisfaction -- and thereby most likely to be economically efficient. This is a distinctive feature of Qwest's plan. The inefficiencies which will occur in those rare instances where two carriers refuse to cooperate in establishing interconnection facilities (and each thereby constructs its own) will simply serve to incent carriers to negotiate more seriously in other instances. In other instances, as discussed below, interconnection at the edge does not merit concern. The benefits of Qwest's plan are such that interconnection at the edge is a worthy goal, even if the Commission does not adopt bill and keep.

1. Qwest's Edge Plan Is Simple To Implement.

The Rural Alliance has criticized interconnection at the edge as not well-defined and too complex to implement.<sup>23</sup> Because Qwest's plan requires each carrier to get to the edge of the other carrier's network without exceptions or distinctions based on network architecture or size of the carrier, Qwest's plan is quite simple to implement. There is no room for regulatory intervention when two carriers cannot agree on how to split the responsibility of carriage

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<sup>22</sup> This section addresses the issue of interconnection at the edge as a separate concept from bill and keep at the edge.

<sup>23</sup> Don't Get Too Close To The "Edge" by the Rural Alliance at 8.

between the respective edges of the two networks. As for those such as Verizon<sup>24</sup> who claim that there would be significant implementation costs, while there may be some costs, Verizon has not quantified them. Moreover, under Qwest's plan, carriers that are already directly interconnected may agree not to change their existing connection even after the network flip. Qwest believes it likely that many carriers would decide to keep their existing interconnection arrangements. In all events, those "complexity" issues proffered as a reason to reject interconnection at the edge do not apply to Qwest's proposal.

## 2. Qwest's Edge Plan Meets Rural America's Needs.

Some rural carriers have complained that interconnection at the edge does not account for geographic differences in the provision of transport.<sup>25</sup> They fear that interconnection at the access tandem would impose more costs on rural companies, and that the transit/tandem provider would exert market power over the small carrier.<sup>26</sup> Similarly, GVNW fears that a large portion of rural carriers' transport costs will be uncompensated.<sup>27</sup>

Qwest's plan avoids these problems by allowing carriers to recover their increased transport costs from their own customers as part of the benchmarked end-user rate. To the extent that the carrier has revenue needs exceeding the benchmark rate, upon Commission approval the carrier may charge a termination fee on interexchange traffic. The fact that it may be necessary to transport traffic outside of a carrier's normal local service area in order to interconnect with other carriers under a uniform and non-discriminatory interconnection and compensation plan presents a reasonable approach to interconnection. It must be remembered that, in evaluating

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<sup>24</sup> Verizon at 32-33.

<sup>25</sup> See, e.g., Frontier at 6.

<sup>26</sup> Rural Associations (Colorado Telecommunications Association, Oregon Telecommunications Association and Washington Independent Telephone Association) at 38-39.

<sup>27</sup> GVNW at 19-20.

this argument, the converse of the argument is also true and other interconnecting carriers will need to transport their own traffic to the edge of the rural carrier's network. This mutual incentive to develop efficient methods of interconnection that is at the heart of Qwest's plan works to the ultimate advantage of all carriers. This feature of Qwest's plan, allowing a competitively neutral mechanism for carriers with high transport costs to recover those costs, stands in marked contrast to the competing edge plans. The ICF attempts to deal with this issue, but its solution, the CRTC carve-out, is discriminatory. The Independent Wireless Carriers and T-Mobile simply fail to address rural concerns about transport costs in their plans.

### 3. Qwest's Edge Plan Is Less Susceptible To Arbitrage.

Commenters opposed to interconnection at the edge have posited a number of potential arbitrage scenarios. For example GVNW proposes that ISPs could stop serving their dial-up customers via a modem bank in the local calling area.<sup>28</sup> Instead the ISPs could establish an affiliated IXC and establish an IXC POP at the retail customer's LEC tandem office. The ISP would then require that its dial-up customers place an interexchange call via the affiliated IXC to reach the Internet. The ISP could thus avoid the cost of local business lines and modem banks and would instead burden the local switch and the tandem switch.<sup>29</sup> Of course, these calls have value to the end user placing the calls so the end users should be charged by the originating incumbent LEC.<sup>30</sup> Qwest can discern absolutely nothing wrong with this scenario -- indeed, bill and keep is meant to avoid creative arbitrage, and it appears that GVNW's concern simply

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<sup>28</sup> *Id.* at 18. Such a local modem bank is currently necessary if the call is to be a local call.

<sup>29</sup> *Id.*

<sup>30</sup> The Rural Alliance criticizes interconnection at the edge because originating access and 8XX traffic obligations will continue even though those obligations provide "no value for the LEC or its customer." *See* Rural Alliance at 5. To the contrary, originating access and 8XX calls do provide value to the LEC's customers, so the LEC's end-user charge should recover the costs of such usage.

represents elimination of an arbitrage opportunity. Similarly, Verizon fears that a competitive LEC would specialize in customers located close to the incumbent LEC's edge and thus would not have transit costs while the incumbent LEC would have to transport calls across the LATA to the competitive LEC.<sup>31</sup> Clearly, this can happen now with the single point of interconnection. Moreover, Verizon advocates basically no change in the current interconnection system, which is rife with much more serious arbitrage, such as phantom traffic. In point of fact, there is nothing inherently wrong with carriers designing their networks to maximize efficiency.

4. Interconnection At The Edge Is A Worthy Goal, Even If The Commission Does Not Adopt Bill And Keep.

The current system of interconnection is complex and inefficient with different types of traffic entering the network at different interconnection points, but each subject to basically the same functions upon being sent to the called party. Qwest believes that adopting its interconnection at the edge proposal, even in the absence of bill and keep, would increase the efficiency of the nation's telecommunications network. Obviously, if moving to interconnection at the edge results in a loss of intercarrier compensation, then there must be an opportunity for carriers to recover that lost revenue just as there must be an opportunity to recover any loss.

Qwest's interconnection at the edge plan is not discriminatory and is competitively and technologically neutral. Moreover, Qwest's plan is simple to implement, meets rural America's needs, and is not easily susceptible to arbitrage. By focusing on each carrier's responsibility to take its traffic to the edge of interconnecting carriers, the Qwest plan provides a market incentive to carriers to work together to solve in a mutually acceptable fashion the major objections to the regulatory solutions to the edge concept posited by commenters.

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<sup>31</sup> Verizon at 32-33.

### III. QWEST'S BILL AND KEEP PLAN IS THE OPTIMAL APPROACH TO INTERCARRIER COMPENSATION.

Qwest's plan for intercarrier compensation is a simple and straightforward version of bill and keep under which each carrier is responsible for recovering the costs of its own network from its own subscribers, with the exception of costs associated with the provision of transiting traffic. The primary means of recovering forgone intercarrier compensation will be to increase the federal SLC<sup>32</sup> such that the combination of the residential and business rates, any state SLC and the federal SLCs (all weighted by lines) would be increased to the lower of a national benchmark<sup>33</sup> or the level needed to recover the forgone intercarrier compensation. If the level needed to recover the forgone intercarrier compensation exceeds the national benchmark, then the carrier could recover the remainder, *i.e.*, that which is not recovered by moving the combined rate to the benchmark level, through a charge on termination of interexchange traffic by carriers upon Commission approval.

#### A. Qwest's Bill And Keep Plan Avoids The Problems Noted By Those Who Oppose Interconnection At The Edge.

As noted above, the Qwest approach to edge interconnection deals with many of the objections levied against other approaches to interconnection at the edge. Coupled with the Qwest approach to bill and keep, the Qwest proposal eliminates most of the other concerns raised

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<sup>32</sup> Qwest recommends that the Commission convene a federal-state joint board to develop a plan to bring the revenues, costs and investment associated with intrastate access charges and reciprocal compensation revenues into the federal jurisdiction. Accordingly, the federal SLC increase would recover both interstate and intrastate access, as well as forgone intercarrier compensation for local traffic. It would be assessed on all terminating interexchange traffic.

<sup>33</sup> The national benchmark rate would be set based on the weighted average of the incumbent LEC single line residential and business rates, intrastate SLCs and interstate SLC for urban wire centers, weighted and calculated as of the last day of the base year. Added to this amount would be the forgone intercarrier compensation offset by continuing transiting charges and interconnection revenues. The benchmark rate would be set at 125% of the national average of these urban rates, including the national average of forgone compensation for urban carriers.

by opponents to bill and keep or edge interconnection. Objections to bill and keep advanced by commenters include fears that: 1) costs will be shifted to end users, some of whom may become unable to afford telephone service; 2) incumbent LECs may not be able to attract investment; 3) bill and keep is not suitable for one-way or unbalanced traffic; 4) bill and keep is not suited to the current wide range of competitive models; 5) bill and keep will make negotiations more difficult; 6) costs will be shifted to the Universal Service Fund. As is shown below, Qwest's bill and keep plan does not merit these concerns and, indeed, addresses most them.

1. Qwest's Bill And Keep Plan Maintains Affordable End-User Rates.

Some parties<sup>34</sup> have commented that moving from the current incumbent LEC rate structure to a bill and keep rate structure with cost recovery from end users will generally make local phone service unaffordable. Further, rural incumbent LECs have argued that a bill and keep rate structure will make urban and rural telephone rates more disparate in contradiction to the 1996 Telecommunications Act.<sup>35</sup>

Qwest's proposal for bill and keep at the edge neither makes telephone service unaffordable, nor increases rate disparity between urban and rural areas beyond levels that can be considered within the range of comparability. Qwest's proposal is able to maintain affordability and urban/rural comparability by developing a benchmark based on 125 percent of the weighted average of urban residential and business rates (including SLCs). This benchmark is approximately \$37. Under this proposal, the incumbent LEC's current interconnection revenues are converted to an increase in the SLC up to the benchmark (or revenue neutrality, whichever is

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<sup>34</sup> Minnesota Independent Coalition at 5; NTCA at 24-26. *See also* CenturyTel at 17-18.

<sup>35</sup> *See generally* Rural Associations at 32.

lower).<sup>36</sup> By limiting the weighted average of residential and business rates (including SLCs) for rural carriers to this benchmark, rural service is both affordable and comparable to urban rate levels.

The Bureau of Labor Statistics (“BLS”) Consumer Expenditure Survey from 2003 demonstrates the current level of comparability: Urban expenditures for Telephone Services equal 2.3 percent of the average annual urban consumer expenditures, whereas rural expenditures for Telephone Services equal 2.5 percent of the average annual rural consumer expenditures.<sup>37</sup>

Table 1

	All Consumer Units		Total Urban (Central City & Other)		Rural	
	Monthly Expenditure	% of Total Annual Expenditure	Monthly Expenditure	% of Total Annual Expenditure	Monthly Expenditure	% of Total Annual Expenditure
<b>Telephone Services</b>	<b>\$79.67</b>	<b>2.3%</b>	<b>\$80.58</b>	<b>2.3%</b>	<b>\$72.92</b>	<b>2.5%</b>
Residential/Pay Phones	\$51.63	1.5%	\$51.72	1.5%	\$51.04	1.7%
Cellular	\$26.34	0.8%	\$27.21	0.8%	\$20.23	0.7%
Pager Service	\$0.09	0.0%	\$0.09	0.0%	\$0.11	0.0%
Phone Cards	\$1.57	0.0%	\$1.58	0.0%	\$1.50	0.1%
<b>Average Total Annual Expenditure</b>	<b>\$40,817</b>		<b>\$41,619</b>		<b>\$35,157</b>	

While rural consumers pay 0.2 percent more of their average annual expenditure on telephone services than urban consumers, urban consumers pay on average \$92 more per year for telephone services.

The values in the table above can be modified to reflect the estimated urban and rural rates after the implementation of Qwest’s proposed bill and keep structure. This analysis shows that after bill and keep is introduced the expenditure for basic local service increases, while the

<sup>36</sup> If revenue neutrality is not met after moving to the benchmark, the incumbent LEC may petition the Commission to establish an interexchange termination charge to maintain revenue neutrality.

<sup>37</sup> In these charts, “Residential/Pay Phones” includes long distance and all features.

expenditure for long distance service decreases. The net result of these changes for the average urban consumer is an increase of \$0.54 per month to \$81.12 per month. This leaves the urban average telephone service expenditure at 2.3 percent of the urban average total expenditures. The average rural telephone expenditure increases \$11.64 per month (assuming the same absolute level of long distance savings as urban consumers) to \$84.56 per month. This moves the rural telephone expenditure to 2.9 percent of total rural expenditures. The resulting difference between urban and rural telephone expenditures as a percent of total expenditures is 0.6 percent, which is less than the current difference in urban and rural expenditures for food and health care.<sup>38</sup> These amounts are legally and statistically insignificant.

To the extent that lower income households, both urban and rural are affected by the increases in the SLC, Qwest proposes that the Lifeline program be expanded to offset this increase.

A detailed explanation of the methodology used to calculate the impact of Qwest's bill and keep proposal on urban and rural telephone expenditures is found in Appendix A.

## 2. Qwest's Plan Will Encourage Efficient Investment In Incumbent LECs.

CenturyTel also claims that shifting costs to end users would discourage investment in incumbent LECs.<sup>39</sup> CenturyTel claims that this is so because it fears that bill and keep will not be revenue neutral, as relying only upon end-user fees will be unsustainable in high cost areas. Qwest does not believe the nation's economy will suffer if there is decreased investment in business plans that depend upon inefficient network configurations and arbitrage nor does it believe that real investment is dependent on such inefficiencies. In these times of increasing

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<sup>38</sup> Bureau of Labor Statistics – Consumer Expenditure Survey 2003, Table 1702.  
[WWW.bls.gov/cex/2003/Standard/pdf](http://WWW.bls.gov/cex/2003/Standard/pdf).

<sup>39</sup> CenturyTel at 19-26.

competition, one carrier profiting from taxing its competitors is not an appropriate business model in any area, and investment based on an expectation that such a scenario could continue would be imprudent and non-sustainable. Moreover, it is generally accepted that the carrier access charge infrastructure (represented at the federal level in Part 69 of the Commission's rules) is so susceptible to arbitrage and avoidance that it is not sustainable in the long run in any event. Thus, even if CenturyTel's point were superficially valid today, it would ultimately seek to tie the future of the American telecommunications industry to a structure that is ultimately non-viable. The financial community will reward those carriers who present intelligent business and investment plans. If a bill and keep regime discourages investment in certain business models, that is the natural and salutary result of properly functioning market forces.

3. Qwest's Plan Is Optimal Even Where Traffic Is Not Balanced.

Some carriers argue that bill and keep is not suitable for one-way or unbalanced traffic.<sup>40</sup> In a related complaint, the Indiana Utility Regulatory Commission fears that bill and keep will cause an increased demand for originating traffic since the originator will not have to pay for termination.<sup>41</sup>

The Staff Analysis appearing as Appendix C to the *Further Notice* successfully refutes both of these points. First, as to one-way traffic, the customers of the carriers involved each derive a mutual benefit from the calls and should pay their carrier for use of the network of which they are an end user. The Staff analyzed this in the context of paging carriers. The Staff noted that the customers of both carriers experience a mutuality of benefit from any given call<sup>42</sup>

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<sup>40</sup> See, e.g., Frontier at 5-6.

<sup>41</sup> Indiana Utility Regulatory Commission at 5-6.

<sup>42</sup> In fact, the sole reason to subscribe to a paging carrier is to enable the customer to receive paging notifications, and it is ludicrous to suggest that paging customers are not benefited by receiving such notifications.

and concluded that the customers of the paging carriers should pay their carrier for the calls that are terminated to them.<sup>43</sup> This same analysis holds true for other networks that do not have balanced traffic. In fact, such traffic should not and cannot be deemed eligible for “reciprocal compensation” in the first place because there is nothing reciprocal about it. In most cases -- *e.g.*, paging and ISP traffic -- the “cost causer” of a particular call is the called party who invited the transaction in the first place, not the calling party or the calling party’s network. The called party and the calling party both receive an economic benefit by virtue of the successful solicitation of the calls (much like the situation with 800 calls in other contexts), and it is simplistic and wrong to argue that there is some inherent right of carriers serving customers with one-way traffic to charge anyone other than their own customers.

The Staff Analysis also addresses fear that bill and keep will cause an increased demand for initiating traffic, including unwanted calls. This seems to be a speculative concern at best, and the Staff noted that intercarrier compensation is not the source of unwanted calls and is not the place for imposing the solution. Services such as caller ID and the state and national “Do Not Call” registries give customers control over the calls they receive, and other solutions are readily available if the problem of unwanted calls increases. Fears that bill and keep is not suitable for unbalanced traffic or will lead to unwanted calls are not sound reasons for retaining an uneconomic system or failing to adopt Qwest’s plan. As is well illustrated by the “ISP reciprocal compensation” scam, it is with unbalanced traffic where the greatest potential for arbitrage lies. While there may be imperfections in any regulatory solution to intercarrier compensation, the current structure is utterly unsustainable, and bill and keep is a far more rational approach.

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<sup>43</sup> *Further Notice*, 20 FCC Rcd at 4788-89, Appendix C.

4. Qwest's Plan Is Suited To The Wide Variety Of Competitive Models.

BellSouth claims that bill and keep is not suited to the wide range of competitive models currently seen in the market. For example, BellSouth claims that bill and keep would not be competitively neutral between a carrier offering only IXC services and a full service (local and IXC) carrier.<sup>44</sup> BellSouth gives the following example, Carrier A an IXC, Carrier B a full service carrier, and Carrier C a local carrier all serve the same geographic market. An end user could obtain service from Carrier C and Carrier A or from Carrier B alone. BellSouth posits that between Carrier A and Carrier B only Carrier B has to bear the cost of the local network where the call originates. Both Carrier A and Carrier B must bear the cost of interexchange transport. BellSouth further posits that Carrier C will not have the opportunity to recover the cost of enabling the interexchange call, and thus will not be able to capture the value its network creates for Carrier B and its customers, and will be hesitant to invest in its network.

Qwest believes that BellSouth's fears are not well-founded. For example, an end user buying both local and long distance services could either buy them separately from Carrier C and Carrier A, or buy them bundled from Carrier B. In both instances the end user will pay for use of the local network (either to Carrier B or to Carrier C) and will pay for interexchange transport (either to Carrier B or to Carrier A). Contrary to BellSouth's fears, bill and keep would be competitively neutral between specialized and full service carriers.

5. Qwest's Plan Will Lead To Negotiated Agreements  
And Efficiently Interconnected Networks.

BellSouth also complains that bill and keep will not lead to negotiated agreements. BellSouth's claim is that starting at a zero rate does not leave much room for negotiations

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<sup>44</sup> BellSouth at 10.

because carriers would be unlikely to agree to pay.<sup>45</sup> There are two concepts at issue in Qwest's proposal, interconnection at the edge, and payment for use of another carrier's network. Under Qwest's proposal carriers would negotiate how they interconnect, which would lead to a more efficient network. Payment for use of another carrier's network addresses the methodology for setting the rate, and Qwest's plan tries to circumvent endless arguments about which measure of cost is correct. Qwest agrees that bill and keep is unlikely to lead to a lot of carriers agreeing to pay a rate above zero. But that is not the point. While, BellSouth asks the Commission to dictate cost-based rates,<sup>46</sup> experience has shown that no one agrees on the appropriate measure of costs: historical costs, TELRIC, TSLRIC or something else. This is made even more difficult as carriers are in the process of switching out their infrastructure from traditional switches to soft switches, which vary in cost more than traditional switches.<sup>47</sup>

It is in recognition of this problem that Qwest supports the approach that requires originating carriers to assume responsibility for bringing their traffic to the edge of the network of terminating carriers. Because both carriers (assuming that they both want to exchange traffic) have to consider their own expense in delivering their traffic to the edge of the other carrier's network, their incentive to negotiate interconnection is enhanced, not dampened, by Qwest's plan.

Verizon opposes bill and keep and seeks negotiated agreements that include compensation.<sup>48</sup> Qwest supports negotiated agreements within the framework of interconnection at the edge as an integral part of bill and keep at the edge. However, Qwest would not allow

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<sup>45</sup> *Id.* at 11-12.

<sup>46</sup> *Id.*

<sup>47</sup> USTA at 23-24.

<sup>48</sup> Verizon at 19-21.

negotiated compensation arrangements because of the threat that unequal bargaining power might permit one carrier to insist on a compensation scheme that undercuts the basic bill and keep principles that are at the heart of Qwest's plan. The regulatory framework for negotiated agreements under Qwest's approach would include, in addition to bill and keep at the edge, as described herein:

- nationally established core processes;<sup>49</sup>
- a well-coordinated transition as laid out in Qwest's initial comments;
- a negotiations clock under which more detailed default rules would apply if there is no agreement after a certain time frame;
- the states will arbitrate any disputes only to the extent the agreements are subject to Section 252;
- federal, rather than state, oversight of transiting; and
- market-based pricing of transiting.

Within this framework, Qwest's plan will lead to efficiently connected networks, and will achieve that goal through negotiated agreements between carriers.

#### 6. Qwest's Plan Will Not Over-Burden The Universal Service Fund.

BellSouth complains that adopting bill and keep could harm the Universal Service Fund since carriers could no longer recover costs from other carriers. Qwest's bill and keep proposal does not have that problem. Qwest's plan will burden the Universal Service Fund as little as possible because it allows for the highest cost carriers to collect a termination charge for

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<sup>49</sup> While companies should not be limited in their negotiations, industry groups should define baseline issues such as ordering methodology, bill formats, EDI standards, interconnection information (NECA 4, LERG), and so forth. In the absence of a negotiation to the contrary, these baseline issues provide a degree of stability to back office functions that are expensive and time consuming to modify.

interexchange traffic. The only additional charge to the Universal Service Fund will be the potential for additional charges to the Lifeline Program as end-user rates increase.

In sum, Qwest's plan will maintain affordable end-user rates, and encourage efficient investment in the nation's telecommunications system. The plan will be optimal even when traffic is not balanced, and for any business model. It will lead to negotiated agreements and efficiently interconnected networks and will not over-burden the Universal Service Fund.

IV. THE COMMISSION SHOULD ENSURE THE LEGALITY OF ITS UNIFORM NATIONAL APPROACH TO INTERCARRIER COMPENSATION REFORM BY CONVENING A FEDERAL-STATE JOINT BOARD TO ASSIST IT IN RESOLVING THE LATENT JURISDICTIONAL ISSUES RAISED BY SUCH UNIFORMITY.

There is considerable agreement that a rational intercarrier compensation plan must encompass both federal and state intercarrier compensation. Almost all commenters, no matter what their position on the Commission's jurisdiction to actually adopt such a uniform structure, agree that a single approach to intercarrier compensation that covers all traffic is the most desirable approach to the difficult issue of intercarrier compensation.<sup>50</sup> This only makes sense. An intercarrier compensation plan that dealt differently with interstate and intrastate intercarrier compensation would only perpetuate one of the chief anomalies that intercarrier compensation reform is intended to alleviate – interstate/intrastate arbitrage. Even if the ultimate plan devised by the Commission were to be marked by seminal luminescence, it would be doomed to failure if it applied only to some traffic as differentiated by the jurisdictional end points of particular communications. No one seems to seriously question this premise.

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<sup>50</sup> See, e.g., NARUC at 3, New Jersey Board of Public Utilities at 2; MO PSC at 3; Nebraska Public Service Commission at 2; agreeing that a uniform approach to intercarrier compensation is superior to an approach that is piecemeal based on the jurisdiction of a particular communication.

Where the parties differ is whether the Commission can lawfully, under the existing statute, impose such a uniform plan without running into difficulty with state jurisdiction. While many commenters claim that the Commission has the clear jurisdiction to adopt a uniform intercarrier compensation plan and impose it for all traffic, including intrastate traffic,<sup>51</sup> this premise is challenged by state regulators and state regulatory associations.<sup>52</sup> The universal recurring theme in these comments is that the Commission has only limited authority over intrastate telecommunications services, including authority over carrier interconnection when that interconnection is used to carry intrastate traffic. The claim is made that the Commission's jurisdiction over intercarrier compensation is also limited when some of the traffic being exchanged between carriers is considered to be jurisdictionally intrastate under the traditional test for measuring the jurisdiction of telecommunications traffic.<sup>53</sup> Essentially these commenters claim that Section 152(b) of the Act fences off the Commission from exercising jurisdiction, direct or indirect, over any intrastate traffic in the absence of an explicit grant from Congress.<sup>54</sup> Finding no such grant in the Act, the commenters oppose an exercise of federal jurisdiction over "intrastate" intercarrier compensation on the basis that the jurisdiction does not exist.<sup>55</sup>

Qwest is quite comfortable with the position taken in its initial comments that the Commission has plenary jurisdiction over intercarrier compensation matters involving a LEC

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<sup>51</sup> See, e.g., BellSouth at 40-50; Comporium at iv; CTIA at 20-21; USCC at 8-9; USTA at 24-31.

<sup>52</sup> See NARUC at 6; Maine and Vermont at 4-13; Public Utilities Commission of Ohio at 3-11; MO PSC at 12-17.

<sup>53</sup> See *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Regulation of Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826 (2005), *appeal pending sub nom. AT&T v. FCC*, Case No. 05-1096 (D.C. Cir. 2005).

<sup>54</sup> See *Louisiana Public Service Commission v. FCC*, 476 U.S. 476, 106 S. Ct. 1890 (1986).

<sup>55</sup> See, e.g., NARUC at 4-6; Maine and Vermont at 4-6; Public Utilities Commission of Ohio at 1-4; MO PSC at 11-17.

under Section 251(b)(5) of the Act, in addition to its overall jurisdiction over intercarrier interconnection and compensation under Section 201.<sup>56</sup> Despite the restriction on Commission regulation of intrastate rates, strict matters of interconnection and compensation among carriers are firmly within the authority of the Commission.<sup>57</sup> The fact that some of the traffic exchanged by the two carriers would be classified as jurisdictionally intrastate for other purposes (*e.g.*, access traffic) does not diminish the Commission’s authority over intercarrier compensation which includes that traffic.<sup>58</sup>

But the fact that the Commission has plenary jurisdiction over interconnection between carriers, including intercarrier compensation, does not resolve all of the jurisdictional issues raised in this proceeding. The need for immediate and permanent action militates towards devising a cooperative way to ensure that the Commission is not subsequently found to have overstepped its jurisdictional boundaries, while at the same time avoiding the chaos that could result if states were left to their own whims in devising their own “intrastate” intercarrier compensation strategy. Qwest submits that, in this context, while it might seem superficially quicker for the Commission to simply assume jurisdiction over all intercarrier compensation (and ancillary matters such as ensuring that a new intercarrier compensation structure does not prevent dominant carriers from recovering lost access revenues from other sources), the danger of subsequent court reversal is such that whatever expedition could be gained from such

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<sup>56</sup> 47 U.S.C. § 201.

<sup>57</sup> See Qwest Initial Comments at 22-25.

<sup>58</sup> This is not an anomaly. A more simple example of this situation illustrates the phenomena. If Carrier A sells a tariffed special access line to Carrier B from Carrier A’s interstate tariff, the special access service provided by Carrier A is interstate if Carriers B’s traffic is more than 10%. But Carrier B’s intrastate common carrier services can nevertheless be regulated by the state, notwithstanding the fact that they are transmitted in part over Carrier A’s interstate special access line.

straightforward action could be short-lived at best. Qwest believes that a federal-state joint board, convened under Sections 410(c) of the Act, provides the optimal procedural vehicle through which the jurisdictional issues could be resolved on a cooperative basis with minimal chance of unacceptable delay.

Qwest sees two potential sources of potentially ruinous delay in the intercarrier compensation proceeding. On the one hand, the Commission could take the advice of various state commenters and establish voluntary guidelines for “intrastate interconnection”<sup>59</sup> and intercarrier compensation. The danger here is that, as these commenters acknowledge, the voluntary nature of the guidelines would present the very real prospect that they would not be followed. In this circumstance the unified intercarrier compensation structure that is the most important part of this proceeding will have died at the very beginning.

On the other hand, the simple solution to this danger -- direct action where the Commission can exercise plenary jurisdiction and preemption where jurisdiction is mixed -- presents dangers almost as acute. Namely, such action by the Commission could result in judicial reversal further down the road, an event that would be catastrophic in this milieu where immediate action is critical. This danger is highlighted by several factors:

- First, the danger of further delay caused by judicial reversal is not chimerical and the consequences of such a reversal could be dire. Particularly telling are the comments of Verizon,<sup>60</sup> in which Verizon points out the critical nature of a unified approach, details the arguments in favor of federal preemption and a federal unified intercarrier

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<sup>59</sup> Of course, there is no such thing as purely “intrastate” interconnection in the public switched network context.

<sup>60</sup> Verizon at 33-42.

compensation regime, but concludes that the force of these arguments is “uncertain” and that:

[I]f the Commission were to conclude for any reason that it lacks authority to regulate intercarrier compensation for intrastate traffic, the commission should seek such authority from Congress so that the Commission could address issues related to intercarrier compensation comprehensively, rather than piecemeal.<sup>61</sup>

Verizon’s point is valid, although the real danger lies not in what the Commission concludes, but rather in what the consequences might be if an appellate court were to disagree with the Commission’s analysis and the rules and conclusions predicated on that analysis were it to suffer judicial vacatur. As is discussed further below, a federal-state joint board can ensure that essential state input is received and considered in the formulation of a unified intercarrier compensation plan, and the Commission’s jurisdictional position will be strengthened.

- Second, as noted in Qwest’s initial comments,<sup>62</sup> it appears likely that a federal-state joint board will be necessary in any event because of the difficulty the Commission would have in sustaining any preemption that resulted in an increase in intrastate rates. The Commission’s authority to require a state to increase rates subject to state jurisdiction would seem to be extremely limited, yet at the same time the Commission clearly has the federal responsibility to provide a vehicle to permit recovery of forgone intrastate access revenues. A separations shift (allocating the expenses, revenues and investment related to forgone intrastate access charges to the interstate jurisdiction) by means of a federal-state joint board seems to be the most appropriate method of addressing this key issue.

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<sup>61</sup> *Id.* at 38. *See also* Time Warner at 7 (Commission preemptive jurisdiction is “likely” to be sustained).

<sup>62</sup> Qwest Initial Comments at 26-27.

Since it is appropriate to convene a federal-state joint board to deal with separations treatment of the forgone intrastate access revenues, it is also sensible to take advantage of that board to deal with the other jurisdictional issues raised by the necessity of a uniform approach to intercarrier compensation. The appropriate issues for joint board consideration are:

- The appropriate separations changes necessary to permit the Commission to adopt a plan that enables carriers to recover forgone intercarrier compensation revenues from a unified subscriber line charge.
- The authority of the Commission to adopt bill and keep in the context of Section 252(d) of the Act (that is, what actions need to be taken to ensure that the Commission has the necessary authority to adopt the plan) and state jurisdiction to adopt reciprocal compensation prices.
- The authority of state regulators to enact intercarrier compensation and interconnection rules contrary to those adopted by the Commission (that is, is there any room for state regulation of carrier-to-carrier relations after implementation of the Commission's plan).

It is obvious that a federal-state joint board will take time, and time is of the essence in this docket. However, given the fact that a court reversal on jurisdictional grounds would be far more unacceptable than whatever delay is occasioned by the deliberations of a joint board, convening a joint board immediately and giving it an expedited and ambitious schedule for completion of its work seems to be a prudent approach from the perspective of ensuring timely action. In fact, there is no reason why the Commission itself could not establish tight timelines

and procedures to govern the conduct of the joint-board's proceeding in order to insure timely action.

While the fact that a separations change is necessary to fully implement a uniform intercarrier compensation structure dictates that a federal-state joint board is necessary in any event, Qwest suggests that the procedures contemplated in Section 410 of the Act apply to all of the difficult jurisdictional matters presented in this docket for which Qwest believes referral is appropriate. The purpose of the processes in Section 410 is to delineate the "boundaries of the power exercised by the Commission, on the one hand, and by state and local regulatory bodies, on the other."<sup>63</sup> The powers of the Commission acting in jurisdictional areas with the advice of a joint board are expansive, and, indeed, Section 410 was designed by Congress to treat jurisdictional issues arising when the delineation of jurisdiction was not clear-cut.<sup>64</sup> Of course, allocation of particular investment to the interstate jurisdiction is decisive in determining the scope of the Commission's regulatory authority,<sup>65</sup> but the language of the Act makes it clear that federal-state joint boards are appropriate in jurisdictional matters going well beyond the separation of jointly used telecommunications facilities into federal and state components.<sup>66</sup> The two additional issues suggested by Qwest fit within the parameters of matters properly referable to a joint board.

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<sup>63</sup> *Reservation Telephone Cooperative v. FCC*, 826 F.2d 1129, 1132 (D.C. Cir. 1987).

<sup>64</sup> *National Association of Regulatory Utility Commissioners v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984); *North Carolina Utility Commission v. FCC*, 537 F.2d 787, 794 (4th Cir. 1976).

<sup>65</sup> *See National Association of Regulatory Utility Commissioners v. FCC*, 737 F.2d 1095, 1113-1114 (D.C. Cir. 1984), *cert denied*, *National Association of Regulatory Utility Commissioners v. FCC*, 105 S. Ct. 1224, 105 S. Ct. 1225 (1985).

<sup>66</sup> 47 U.S.C. § 410. *Illinois Bell Telephone Company v. FCC*, 883 F.2d 104, 114 (D.C. Cir. 1989); *National Association of Regulatory Utility Commissioners v. FCC*, 746 F.2d 1492, 1499-01 and n.5 (D.C. Cir. 1984).

In short, Qwest submits that a federal-state joint board is both necessary and prudent to assist the Commission in devising a uniform jurisdictional structure for intercarrier compensation that is both comprehensive and stable. The issues presented in this docket are too urgent to wait and see whether voluntary compliance with Commission guidelines is ultimately effective on the one hand, or to risk judicial reversal by taking preemptive action without the advice of a federal-state joint board.<sup>67</sup> The Commission clearly has the authority to establish an expedited, even ambitious, time schedule for joint-board action. While it might have been preferable for this approach to have been taken earlier in the process, Qwest submits that the issues at stake are too important to risk the unnatural delay that would be a logical result of not convening a federal-state joint board now.

V. CARRIERS MUST BE GIVEN THE OPPORTUNITY TO RECOVER REVENUES FORGONE IN ANY REVISED INTERCARRIER COMPENSATION STRUCTURE.

Qwest pointed out in its initial comments that the Commission has a legal obligation, when adopting a new regulatory structure that has the direct impact of reducing the revenues of regulated carriers – revenues that had been reasonably anticipated and relied on in making prudent investment and operational decisions – to make other necessary regulatory modifications in order to permit these carriers the fair opportunity to earn at the level achieved prior to adoption of the new rules.<sup>68</sup> Those commenters who oppose this principle generally do so based on a misunderstanding of the law and/or the position which Qwest advocates.<sup>69</sup> Qwest does not

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<sup>67</sup> It is, of course, axiomatic that the recommendations of a federal-state joint board are advisory only. *See National Association of Regulatory Utility Commissioners v. FCC*, 746 F.2d at 1499, agreeing that Section 410 “appears to recognize national primacy by leaving the FCC discretion to follow or ignore state recommendations and requests.”

<sup>68</sup> Qwest Initial Comments at 25-27.

<sup>69</sup> *See, e.g.*, Ad Hoc at 10-31; CompTel/ALTS at 7-8; Cox at 5, 11-13; NASUCA at 28-29; NCTA at 8-9; Nextel at 19-23.

assert that the Commission is obligated to stand as a guarantor of Qwest's revenue streams, or to protect Qwest's revenues from inroads made by competitors. Qwest recognizes that no such right exists. However, Qwest does have a right to the opportunity to recoup the intercarrier compensation revenues (including interstate and intrastate access and reciprocal compensation revenues) lost to the bill and keep structure,<sup>70</sup> and the Commission has a legal obligation to modify its regulatory structure in order to give Qwest this opportunity. Stated conversely, Qwest has the legal right that it not be prevented by regulation, from recovering these revenues.

In this case, Qwest proposes a unified subscriber line charge determined by comparing the total interstate and intrastate access revenues in the most recent calendar year, adjusted to take account of reciprocal compensation payments, as the basis for establishing the permissible SLC increases. This amount would also be part of the benchmark used to determine whether a carrier may charge a termination charge. The amount would be frozen as of the initial calculation and would not be revisited unless the Commission determined to conduct another proceeding.

**VI. THERE IS ALMOST UNIVERSAL SUPPORT FOR QWEST'S POSITION THAT FOUR SIGNIFICANT LEGAL AND POLICY ISSUES SHOULD BE RESOLVED IMMEDIATELY AND STRONG SUPPORT FOR QWEST'S POSITION ON EACH OF THOSE ISSUES.**

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There is, in the initial round of comments, almost universal agreement that the Commission should act immediately to resolve four significant legal and policy issues that implicate the Commission's intercarrier compensation reform effort but need not await full implementation of comprehensive intercarrier compensation reform. These issues are: transiting traffic; VNXX traffic; CMRS traffic (specifically, elimination of the intraMTA rule); and ISP

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<sup>70</sup> In the event an incumbent LEC's reciprocal compensation revenues are negative (as it is in Qwest's case), this amount would be included with access revenues in determining the ultimate amount to which the carrier was entitled.

reciprocal compensation. Many of the commenting parties that address these issues (and, as discussed more fully below, all of the commenting parties with sound analysis of these issues) support Qwest's position. However, even those commenting parties who disagree with Qwest's substantive positions on these four issues, agree that the Commission can and should take immediate action to resolve them.

A. Qwest's Regulatory Approach To Transiting Services Is Supported In The Well-Founded Initial Comments On Transiting.

As Qwest discussed in great detail in its initial comments, a carrier's obligation to provide transiting, at bottom, can only be founded upon the provisions of Sections 201 and 202 of the Act that require common carriers to provide interconnection with other carriers under the circumstances described in Section 201.<sup>71</sup> Intercarrier contracts of this nature are not subject to the rules related to common carrier services offered to the public, interconnection under these circumstances can only be mandated by the Commission after notice and a hearing as required under Section 201(a) of the Act and the contracts are interstate and must be filed with the Commission under Section 211(a).<sup>72</sup> While there might be instances where a carrier could compel transiting interconnection under the Act, those circumstances are very limited by the Act. Certainly the record does not support a general rule requiring that transiting be provided by certain carriers (*i.e.*, incumbent LECs) on a universal basis at regulated rates. Transiting contracts must be filed under Section 211(a) and contracts or tariffs for such interconnection must avoid "any unjust or unreasonable discrimination in charges..."<sup>73</sup> The Commission should

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<sup>71</sup> Qwest's request for an immediate transiting decision is limited to transiting of traffic currently covered by Section 251(b) of the Act. Traffic covered by a LEC's jointly-provided switched access tariffs is not addressed by this request.

<sup>72</sup> See *AT&T Corporation v. FCC*, 292 F.3d 808, 812-13 (D.C. Cir. 2002).

<sup>73</sup> 47 U.S.C. §§ 201, 202.

allow the market to establish transiting rates and those rates should be deemed reasonable absent a showing to the contrary on a case-by-case basis. This regulatory approach to transiting is supported by the Commission's prior rulings in the *Texcom Order*, the *FCC Virginia Arbitration Order* and numerous other rulings holding that there is no recognized general carrier obligation to provide transiting and that non-TELRIC rates are not appropriate for transiting.<sup>74</sup> This approach also best supports the central policy goals to intercarrier compensation reform -- to promote economic efficiency and to promote facilities-based competition in the marketplace.<sup>75</sup> Moreover, the Commission can and should assert jurisdiction over transiting.<sup>76</sup> Finally, the Commission should clarify that this is the correct treatment of transiting traffic regardless of what it does in terms of a unified intercarrier compensation reform.<sup>77</sup>

In the initial comments filed in this docket, numerous other parties joined Qwest in advocating for this type of minimal regulation of transiting services and in opposing the

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<sup>74</sup> Qwest Initial Comments at 40-42.

<sup>75</sup> *Id.* at 42-43.

<sup>76</sup> To the extent that transiting has in the past been subject to interstate or intrastate tariffs based on the jurisdiction of the transited traffic, this situation would be modified on a going-forward basis by the Commission order on transiting. Qwest contends that current law does not permit a LEC to seek access charges or other compensation from a transit carrier lacking any relationship with the end-user customers. In addition, in those cases where some carriers have filed *interstate* tariffs imposing charges for transited *local* traffic, such tariffs have no force or effect under existing law.

<sup>77</sup> Again, under Qwest's reform plan -- bill and keep at the edge, in a case where the originating carrier utilizes a transit service provider for transport from its network to the edge of the terminating carrier, the transit service provider may charge the carrier originating the traffic for providing transit to either an IXC's or terminating carrier's edge and the originating carrier may recover such costs from its own subscribers. As is the case with other situations where no transiting is involved, and bill and keep at the edge provides an economic incentive to negotiate in transiting situations, the originating and terminating carrier will have an incentive to cooperate and jointly retain a transiting carrier on market terms. It should be kept in mind that, in the transiting context, the originating carrier always has the ability to directly connect to the terminating carrier instead of using a transit carrier. However, if the originating carrier chooses to use the services of a transit service provider, it must of course pay for those services.

contentions of certain parties that transiting service is an obligatory local exchange service. A review of the comments of parties taking that latter position reveals that those parties offer either no legal support for their position whatsoever or simply rely on the same tired and groundless arguments that, in many instances, have already been rejected by the Commission. There is, however, unanimous support among commenting parties addressing this issue that the Commission should resolve this issue immediately and not wait for completion of comprehensive intercarrier compensation reform.<sup>78</sup>

1. Transiting Service Is Not An Obligatory Local Exchange Service.

Numerous parties re-state the same arguments previously posited and discredited in Qwest's initial comments and those of other commenting parties<sup>79</sup> that transiting service is somehow an obligatory local exchange service. Most of these commenting parties argue that either Section 251(a)(1) (requiring telecommunications carriers to “interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers”), or 251(c)(2)(B) (requiring ILECs to provide interconnection “at any technically feasible point within the carrier’s network”) or both create a carrier obligation to provide transiting.<sup>80</sup> Others simply advocate that the Commission impose this extreme, regulatory interventionist obligation

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<sup>78</sup> The regulatory treatment of transiting service must be clarified regardless of whether the Commission ultimately adopts Qwest's bill and keep at the edge plan, adopts some other concept for intercarrier compensation reform (*e.g.*, uniform capacity-based or usage-based rates) or simply keeps the existing system in place.

<sup>79</sup> See Section VI.A.3, *infra*.

<sup>80</sup> GVNW at 29-30 (Section 251(a)); XO at 24-26 (Sections 251(a) and 251(c)(2)); CTIA at 24-27 (Section 251(a), in addition to 201(a) and 201(b)); MO PSC at 36-37 (Section 251(a)); Joint Commenters (KMC, *et al.*), at 56-59 (Sections 251(a) and 251(c)(2), in addition to 201(a)); NuVox at 6-7 (251(a)); US LEC, *et al.* at 21-24 (Sections 251(a) and 251(c)(2)); Leap at 11-14 (Sections 251(a) and 251(c)(2), in addition to 201(a)); Rural Alliance at 123-25 (201(a) and (b)); Nextel at 12-18 (Section 251(a), in addition to Sections 201, 202 and Sections 152(b) and 332 for CMRS providers only).

on transit service providers without offering any legal justification whatsoever -- except perhaps, in some instances, to claim, without any demonstration in the record, that incumbent LECs have market power with respect to transiting.<sup>81</sup> Regardless, as Qwest discussed more fully in its initial comments, these arguments ring hollow.

Sections 201, 202 and 211, as discussed above, provide the totality of the regulatory structure governing the obligation of carriers to provide transiting services between two other carriers. Section 251(a), on its face, deals only with physical connections and imposes no such duty on carriers.<sup>82</sup> Section 251(a) addresses the obligations of originating and terminating carriers to interconnect and places no obligation on other carriers to be the means by which originating and terminating carriers fulfill those obligations. Similarly, Section 251(c)(2) plainly only speaks to the ILEC duty to provide interconnection with *the incumbent LEC's* network. Neither of these provisions can reasonably be read to obligate an incumbent LEC or any other carrier to provide transiting between the networks of two other carriers. Indeed, as the Commission acknowledges in the *Further Notice*, “[t]he Commission’s rules define the term ‘interconnection’ to mean ‘the linking of two networks for the mutual exchange of traffic’ and not ‘the transport and termination of traffic.’”<sup>83</sup> As the Commission also acknowledges in the *Further Notice*, interpreting Section 251(a) to require transiting might be read to suggest that, if two carriers choose to meet their obligations under Section 251(a) by interconnecting directly,

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<sup>81</sup> ITCA at 27; Sprint at 19-20; CCAP at 28-29; ERTA at 4-5; Comporium at 19-20; RIITA at 11-14; NTCA at 12.

<sup>82</sup> See *AT&T v. FCC*, 317 F.3d 227, 234-35 (D.C. Cir. 2003).

<sup>83</sup> *Further Notice*, 20 FCC Rcd at 4741-42 ¶ 128 (citing 47 C.F.R. § 51.5).

each might arguably be required to pass traffic to other carriers through that direct connection -- an obviously absurd result.<sup>84</sup>

Three commenting parties who advocate for the imposition of a transiting obligation, Joint Commenters (KMC, *et al.*), Rural Alliance, and Nextel, correctly cite Sections 201 and/or 202 as applicable to transiting, but appear to contend incorrectly that these sections impose an absolute obligation on LECs to provide transiting.<sup>85</sup> Only one such commenting party offers any legal explanation for this position -- Joint Commenters (KMC, *et al.*) argue that the *Further Notice* in this proceeding satisfies the 201(a) requirement for a hearing to impose a transiting obligation.<sup>86</sup>

Assuming for the sake of argument that this rulemaking proceeding could satisfy the Section 201(a) hearing requirement, the evidence in the record does not come close to justifying a general rule on transiting requiring that it be provided on a universal basis at regulated rates by incumbent LECs. Additionally, Sections 201 and 202 clearly do not otherwise impose an absolute obligation across the board to provide transiting regardless of whether the architecture to do so already exists or LECs would be required to construct that architecture. In either case, LECs are free to decline a request for transiting subject to the requesting party's right to demonstrate that that refusal is either unreasonable or discriminatory under the circumstances. There is simply not a record in this proceeding to impose a transiting obligation on incumbent LECs across the board which is an absolute statutory requirement under Section 201(a).<sup>87</sup>

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<sup>84</sup> *Id.* at n.371.

<sup>85</sup> Joint Commenters (KMC, *et al.*) at 56-59; Rural Alliance at 123-25; Nextel at 12-14.

<sup>86</sup> Joint Commenters (KMC, *et al.*) at 57, n.135.

<sup>87</sup> Additionally, Nextel's argument that Sections 152(b) and 332 establish a LEC obligation to provide transiting to CMRS providers is facially defective. Indeed, Nextel fails to articulate how those sections create such an obligation. Those sections, specifically Section 332(c)(1)(B),

2. Qwest Opposes The Comments Of Certain Parties Contending That The Commission Should Adopt TELRIC Or Pricing Rules For Transit Service.

Many of the commenting parties who present these faulty regulatory arguments in support of a local exchange transiting obligation, discussed above, also roll out the arguments previously rejected by the Commission that the Commission can and should impose TELRIC or pricing regulations on the provision of transit service, rather than allow the market to determine transit prices. Once again, however, these parties either cite facially defective legal arguments in support of these contentions<sup>88</sup> or give no legal justification whatsoever for their contentions.<sup>89</sup> As Qwest discussed at length in its initial comments, there is simply no basis for the argument that, if transiting is required, TELRIC or some other non-market-based pricing methodology should be used to establish regulated rates for transiting. To begin with, there is no basis whatsoever under the Act for an argument that TELRIC pricing should be applied to transiting services. The Act does not require or permit TELRIC pricing to be mandated for services arising out of Sections 201, 202 and 211. Even if, as some argue, Section 251(a) could be read to impose an obligation on carriers to provide transiting services, the Act would not call for TELRIC pricing to be mandated for such services. The law is clear that TELRIC is non-confiscatory in only very limited circumstances and transiting is not one of those circumstances.<sup>90</sup>

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simply track the requirements of Section 201 when they address carrier obligations to “establish physical connections.” Transiting is much more than “physical connections.”

<sup>88</sup> Cox at 17-19 (ambiguous, but appears to rely upon Section 252); XO at 26 (references Commission rules 51.501 and 51.701, but cites no authority in the Act); CTIA at 24-27 (cites Section 201(b)); US LEC, *et al.* at 21-24 (cites Section 252(d)); Leap at 11-14 (cites Section 251(d)(1)); Nextel at 16-17 (cites 251(b)(5) and 252); MetroPCS at 21-22 (ambiguous, but seems to rely on Section 201).

<sup>89</sup> NuVox at 7-8; Rural Alliance at 122-24; T-Mobile at 21-23 (calling for TELRIC pricing without any specific suggested basis in the Act).

<sup>90</sup> *See Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 528 n.39 (2002). *See also Local Competition Order*, 11 FCC Rcd at 15872 ¶ 739.

Nor is there any merit to Nextel's argument that 251(b)(5) applies to the provision of transiting services. The plain language of Section 252(d)(2)(A) (requiring that reciprocal compensation pursuant to Section 251(b)(5) be priced based on "the costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier") makes clear that reciprocal compensation does not apply to the provision of transiting service by the transiting carrier. The phrase "transport and termination" refers to "transport and termination" performed by the carriers serving the calling and called parties (*i.e.*, the end users). In the transiting context, where the transit provider is an intermediate carrier lacking a relationship with an end user involved in the traffic at issue, the transit provider is not subject to the statutory reciprocal compensation provisions.

Finally, as discussed in Qwest's initial comments, requiring transit service providers to pay access charges or other compensation to the carriers serving the calling and called parties makes no sense and would serve only to discourage the provision of transit service. Unlike IXC's, transit carriers provide no service to, and have no billing relationship, with end users from whom they may recover the costs of access charges or other compensation they would be required to pay.<sup>91</sup> Rather, transit service providers are entitled to fair, market-determined compensation from the originating carrier for the transiting service that they provide.

3. Numerous Commenting Parties Support Qwest's Position Regarding The Proper Regulatory Treatment Of Transiting Service.

Other commenting parties endorse Qwest's regulatory approach to transiting. For example, BellSouth echoes Qwest's comments in its advocacy demonstrating the futility of relying upon Sections 251(a), 251(c)(2) or 251(b)(5) to create a carrier obligation to provide

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<sup>91</sup> Qwest Initial Comments at 39-40.

transiting or a regulatory hook for the Commission to regulate transiting rates.<sup>92</sup> BellSouth also argues that there can be no common carrier regulation of transiting under Section 201(a) without a demonstration that LECs wield market power in the relevant transiting market in a way that is causing competitive harm and that the evidence in the record, in fact, shows the opposite -- *i.e.*, a competitive transit service market.<sup>93</sup> Similarly, SBC, in its comments, argues that Section 251(c) provides no basis for regulating transit services.<sup>94</sup> Still other commenting parties, while they do not explicitly endorse Qwest's position that transiting can only be regulated under Sections 201, 202 and 211, call for limited regulation of transiting and do not argue that transiting is a local exchange service covered by Sections 251(a) or 251(c)(2).<sup>95</sup>

4. The Commission Has The Authority To Regulate Transiting.

Some commenting parties contend that, whatever authority the Commission may have with respect to interstate transiting service, it can not deprive the states of their ability to regulate intrastate transiting services.<sup>96</sup> These parties are wrong. Any rule that the Commission established for transiting should and must apply both to interstate transiting and intrastate transiting. As discussed above, the provision of transiting is a common carrier function subject

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<sup>92</sup> BellSouth at 34-35.

<sup>93</sup> *Id.* at 36-38.

<sup>94</sup> SBC at 4, n.2.

<sup>95</sup> *See, e.g.*, Cincinnati Bell at 15-17 (“one would expect to find a more direct authorization [than Section 251(c)(2)] if Congress intended transit traffic to be a mandatory subject of interconnection agreements”); Frontier at 17 (citing the UTF plan, states “Frontier believes transiting can be safeguarded with minimal regulation provided that the intercarrier compensation system is properly designed to harness free market forces, and that effective, minimally-invasive market-based regulatory mechanisms are employed to safeguard those markets where such forces are not present.”).

<sup>96</sup> *See, e.g.*, MO PSC at 37.

to Commission jurisdiction. Moreover, this is appropriate given that it is practically impossible to distinguish intrastate and interstate transiting traffic.

In this regard, it is important to keep transiting in its proper context. When a carrier provides transiting between two other carriers, in almost all cases the traffic passing over that connection will consist of both interstate and intrastate traffic. The service that the transiting carrier provides is simply to allow the two other carriers to interconnect. The transiting carrier has neither knowledge of nor control over the jurisdictional nature of the traffic that the two other carriers chose to pass back and forth on the transiting connection, and it would be both impossible and destructive to seek to have a transiting carrier sift through that traffic and have both interstate and intrastate transiting rates. Thus, the transiting contract is a strictly interstate contract. This does not mean that the traffic itself loses its jurisdictional character, or that relations between the two carriers whose traffic the transiting carrier is carrying are necessarily exempt from state jurisdiction (*i.e.*, in the case of a dedicated facility, intrastate traffic would remain intrastate even if the underlying transit facility would be entirely interstate). That is another issue entirely. But the function and service of transiting itself is interstate and subject to the Commission's exclusive jurisdiction. The Commission should clarify this basic point.

5. The Commission Should Not Require Transit Service Providers To Provide New Billing And Other Services In Connection With Transit Traffic.

Certain commenting parties respond to the Commission's request for comment as to whether or not the billing information, in the transiting context, is adequate to determine the appropriate intercarrier compensation due, *see Further Notice* ¶ 133, by advocating that the Commission should impose new or additional obligations upon transit service providers with respect to transit traffic. These parties argue that transit service providers must take

responsibility to provide specific billing information to terminating carriers or that terminating carriers should have the right to refuse to terminate transiting traffic if it is somehow not “adequately” identified. Again, Qwest believes that the billing information currently available in the transiting context is adequate and opposes any attempt to impose obligations on the transiting carrier to provide specific billing information in the transiting context or otherwise be the guarantor of transit traffic. The information currently available is adequate and, as the Bureau expressly found in the *FCC Virginia Arbitration Order*, 17 FCC Rcd at 27102 ¶ 119, RBOCs are not required to serve as billing intermediaries between carriers who terminate traffic to another carrier by using RBOC transit services. The originating carrier should be responsible for providing billing records to both the transit provider and the terminating carrier. Qwest does offer transit records, when available, for a fee to the terminating carrier so they can bill the originating carrier for the call.<sup>97</sup> Originating and terminating carriers should make agreements between them which outline the methodologies they both agree to for exchanging the information necessary for billing each other for traffic they exchange. Whatever those methodologies are, they cannot impose requirements on transit carriers to fulfill this requirement though the transit carriers should follow industry standards for SS7 signaling as outlined in Telcordia document GR-317-CORE and GR-394-CORE.

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<sup>97</sup> Qwest believes that the “phantom traffic” problem may be alleviated if both the sending and receiving carriers use SS7 signaling and the sending carrier populates fields per industry guidelines. Further, intercarrier agreements between the sending and receiving parties to determine how they will relate may help those carriers who are not fully SS7 capable. But, the Commission should stay away from dictating solutions to the phantom traffic problem such as those advocated by CenturyTel in its May 27, 2005 *ex parte*.

B. Qwest's Regulatory Approach To VNXX Traffic Is Supported By The Great Majority Of Comments Addressing VNXX.

In its initial comments, Qwest advocated that the Commission clarify immediately that VNXX traffic is properly treated as interexchange traffic in order that it may be treated properly during any transition plan. The majority of comments addressing this issue in the initial round of comments join Qwest in condemning this arbitrage and call for this same clarification.<sup>98</sup>

Again, VNXX describes a situation where a call originating in one local calling area, using a dialed local number, is routed to another LEC which terminates to an end user physically located in another local calling area. In other words, it is an interexchange toll call. However, a number of competitive LECs claim that a call is local if the two numbers are local, regardless of where the called party is located. In this way, competitive LECs effectively demand treatment of intraLATA or interLATA interexchange toll calls as local for purposes of determining the proper intercarrier compensation (that is, reciprocal compensation paid by the incumbent LEC to the competitive LEC rather than access paid by the customer to both carriers). Very often, competitive LECs use VNXX to service remote ISP POPs which greatly compounds the problem because of the ISP "reciprocal compensation" issue, but VNXX is also regularly used for non-ISP traffic as well. Regardless of the particular type of traffic involved, competitive LECs use VNXX precisely so that they might both avoid access charges (which apply to the interexchange use of incumbent LECs' local exchange networks) and collect unwarranted "reciprocal compensation" payments.

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<sup>98</sup> Once again, as with the transiting issue discussed above, even those who disagree with Qwest's substantive position on VNXX traffic recognize that the Commission can and should act on this important issue without awaiting enactment of any overall intercarrier compensation reform.

Numerous commenting parties join Qwest in advocating that both interLATA and intraLATA VNXX calls are properly classified as interexchange calls subject to access charges under the current regulatory structure -- *i.e.*, because the Commission's existing rules base the determination of whether a given call is local or interexchange upon the end points of the call.<sup>99</sup>

On the other hand, Qwest was able to identify only three comments in the initial round of comments in this docket, all competitive LECs, that make the argument that calls to a "local" NPA-NXX should be treated as local for purposes of determining whether access charges should be billed, regardless of the actual physical locations of the called and calling parties.<sup>100</sup> None of these parties offer any legal justification whatsoever for this position and, in fact, their self-serving arguments are directly contrary to existing law. Certainly, none of these parties refute the demonstration of Qwest and numerous other parties that calls between two end points in different local calling areas are simply not local, as a matter of law, no matter what numbers are assigned to those end points. Accordingly, the existing rules should be clarified and adequately enforced as necessary to ensure that compensation is not being claimed or received based on a claim that a long distance call is really local because of the assigned telephone number. Qwest will not repeat the sound legal analysis already presented in detail at pages 45 through 49 of its initial comments, which remains un-rebutted.

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<sup>99</sup> OH PUC at 33 (geographical points of call should govern); MIC at 19-21, 32 (access charges should apply); USTA at 32-34, n.6 (recognizing VNXX problems when treated as local traffic; geographical location should govern); Cal. Small LECs at 2-5 (should not be reciprocal compensation when physical points of call not local); Verizon at 59-63 (access charges should apply); CenturyTel at 4, n.4 and 42 ("A number of competitive local exchange carriers (CLECs) have attempted to use 'Virtual NXX' codes to disguise inter-exchange traffic as local and thereby avoid access charges.").

<sup>100</sup> XO at 10-13 (arguing reciprocal compensation should apply); US LEC, *et al.* at 52 (arguing numbers should drive rating); CompTel/ALTS at 13-14 (arguing Section 251(b)(5) should apply to VNXX traffic without giving any supporting justification).

C. Qwest's Proposal As To CMRS Traffic Is Supported In The Well-Founded Initial Comments On That Subject.

As Qwest discussed in great detail in its initial comments, the current regulatory treatment of CMRS traffic creates rate disparity and arbitrage opportunities, primarily because of the disparities in local calling areas. As Qwest also discussed in those comments, adoption of Qwest's bill and keep at the edge plan would resolve many of these issues relating to LEC-CMRS traffic. Finally, Qwest advocated that, regardless of what the Commission does with respect to intercarrier compensation reform, the Commission should eliminate the "intra-MTA rule" now. Again, that rule provides that the local service area for calls originating on or terminating on CMRS networks is the MTA. The Commission could eliminate most of these CMRS-specific compensation problems by simply eliminating the intra-MTA rule and ruling that the local service area for CMRS-LEC traffic is the same area as it is for LEC-LEC traffic -- the incumbent LEC local calling area.<sup>101</sup> Numerous commenting parties endorse this position.<sup>102</sup> Indeed, the only parties that appear to oppose the elimination of the intra-MTA rule are wireless carriers whose primary complaint is that their reciprocal compensation revenues will decrease and they will be forced to live with the same network architecture framework that all other telecommunications carriers must now live with -- a spurious claim in today's world of thriving intermodal competition.<sup>103</sup> Finally, there also appears to be strong and diverse support for Qwest's position that, under any uniform intercarrier compensation reform, no special treatment is required for CMRS traffic.<sup>104</sup>

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<sup>101</sup> Qwest also advocated: (i) that the Commission should, in any event, reaffirm that transit service providers are not responsible for compensating the terminating carrier when the originating carrier is a CMRS carrier; (ii) in response to the Commission request in the *Further Notice*, 20 FCC Rcd 4746-47 ¶¶ 139-40, for comment regarding the costs/challenges that exist with respect to CMRS providers obtaining ICAs with small ILECs, that the adoption of this clarification -- prohibiting terminating carriers from assessing access charges against transit

D. ISP “Reciprocal Compensation” Is A Misnomer And Must Be Eliminated.

While some commenters continue to argue that “reciprocal compensation” is appropriate (and even necessary) when traffic is delivered from one carrier to another carrier with an ISP behind it,<sup>105</sup> there seems to be growing recognition that what is called “ISP reciprocal compensation” is destructive and unsustainable.<sup>106</sup> The most powerful argument to this effect finds itself in the Commission’s own findings, which have not been refuted or even seriously questioned, that paying LECs for delivery of dial-up ISP traffic is fundamentally antithetical to the Act itself and the ultimate future of the telecommunications infrastructure. While the bill and keep at the edge approach to intercarrier compensation solves the ISP “reciprocal compensation” problem, the issue cannot await resolution in the overall context of this docket. Immediate action to move all ISP traffic to bill and keep must be undertaken.

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service providers -- would go a long way toward eliminating that problem; and (iii) that the Commission should clarify that intra-MTA traffic need not be passed through an IXC and need not require that all such traffic go directly to/from CMRS providers (*i.e.*, carriers should be free to establish an indirect connection utilizing a transiting arrangement provided the transit service provider is compensated).

<sup>102</sup> GVNW at 47 (eliminate intra-MTA rule); OH PUC at 30-33 (eliminate intra-MTA rule and use wireline LCA); Cal. Small CLECs at 5-6 (eliminate intra-MTA rule); Rural Alliance at 126-27 (same).

<sup>103</sup> Nextel at 30-31; Allied at 8; MetroPCS at 23-24; Dobson at 8-9; USCC at 15.

<sup>104</sup> *See, e.g.*, Frontier at 17; MO PSC at 39; USTA at 6, 47-49, n.8; Comporium at 20-21.

<sup>105</sup> *See, e.g.*, ITAA at 2-5.

<sup>106</sup> Cincinnati Bell at 3-4; SBC at 23-24; US LEC, *et al.* at 52-55; XO at 11.

VII. CONCLUSION.

For the foregoing reasons, Qwest respectfully requests that the Commission take the actions described herein.

Respectfully submitted,

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